IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.06.2007

Coram :

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN

AND

THE HONOURABLE MR.JUSTICE P.P.S.JANARTHANA RAJA

Tax Case (Appeal) No.497 of 2007

The Commissioner of Income-tax,
Chennai. ..Appellant

Vs

M/s.A.V.Thomas Exports Ltd.,
60, Rukmani Lakshmipathy Salai,
Egmore, Chennai-600 008. ..Respondent

Appeal under Section 260A of the Income-tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Chennai Bench "A", Chennai in I.T.A. No.567(Mds)/2003 dated 12.12.2005 for the assessment year 1990-91. Which has been preferred as against the order dated 17.2.2003 made in ITA.No.Tv.130/2001-02/A-111 of the Commissioner of Income Tax (Appeals) III, Chennai against the order of the Deputy Commissioner of Income Tax Company Circle IV (1) Chennai 6, dated 21.3.2001 for the Assessment year 1990-91 with regard to PAN/GIR-458-A.

For Appellant : Mr.J.Narayanaswamy,
Standing Counsel for
Income-tax Department

JUDGMENT

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(Judgment of the Court was delivered by
P.P.S.Janarthana Raja, J.)

This appeal is filed under Section 260A of the Income Tax Act, 1961 by the Revenue, against the order of the Income Tax Appellate Tribunal, Chennai Bench "A", Chennai in I.T.A. No.567 (Mds)/2003 dated 12.12.2005 raising the following substantial question of law:-

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Whether in the facts and circumstances of the case, the Tribunal was right in holding that the re-assessment beyond a period of 4 years from the end of the relevant assessment year is time barred?

2. The facts leading to the above substantial question of law are as under:

The assessee is a domestic company in which the public are substantially interested. The assessee is engaged in the manufacture and export of garments. The relevant assessment year is 1990-91 and the corresponding accounting year ended on 31.03.1990. The original assessment was completed on 27.03.1992 on "Nil" income. In computation of total income, deduction from the gross total income under Section 80HHC was allowed to the extent of Rs.12,45,994/-. The balance of Rs.2,32,758/- was set off against the business loss. The total income was computed as "Nil". Later the assessment was reopened by the Assessing Officer on 19.08.1998 on the basis of Supreme Court decision reported in 224 ITR 604, in the case of C.I.T. Vs. Kotagiri Industrial Co-operative Tea Factory Ltd. In that decision, the Supreme Court held that the unabsorbed income of earlier years are to be set off before allowing deduction under Chapter VI-A. The said decision, dated 05.03.1997, was not available at the time of completion of the assessment. Aggrieved by the order of reopening of the assessment, the assessee filed an appeal to the Commissioner of Income-tax (Appeals). The C.I.T.(A) dismissed the appeal and confirmed the order of the the Assessing Officer. Aggrieved, the assessee filed an appeal to the Income-tax Appellate Tribunal ("Tribunal" in short). The Tribunal allowed the appeal and set aside the order of the C.I.T.(A). Hence the present tax case is filed by the Revenue.

3. Learned Standing Counsel appearing for the Revenue submitted that later, the Supreme Court laid down the law of the land and the reassessment has in effect brought the assessments within the four corners of law and the extended period is available to the Revenue under the Act as the assessee had not disclosed fully and truly all material facts necessary for the assessment. Further, it is submitted that there was excessive deduction under Section 80HHC of the Act which enabled the Revenue to reopen the assessment under the provision of law.

4. Heard the counsel. The original assessment was completed under Section 143(3) of the Act. The Assessing Officer applied his mind and completed the said original assessment. There is no finding by the Assessing Officer that there is any failure on the part of the assessee resulting in the escapement of income. The Assessing Officer must give categorical finding for the purpose of initiating reassessment under the proviso to

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Section 147 of the Act. In this case the reassessment proceedings were initiated after 31st March 1995 and hence the proceedings initiated by issue of notice under Section 148 is ab initio barred by limitation. In this case, the initiation of proceedings is after a period of four years and the finding given by the Tribunal is that no income has escaped assessment by reason of failure on the part of the assessee. Hence, there is no jurisdiction to reopen the assessment under the provision of Section 147 of the Act. The scope of the said provision has been considered by this Court in the case of Commissioner of Income-tax Vs. Elgi Finance Ltd., reported in 286 ITR 674, and the same reads as follows:

> "The law relating to the reassessment has undergone a change from April 1, 1989. The change was brought in by the Direct Tax Laws (Amendment) Act, 1987. Two sets of provisions were available under section 147 in clause (a) and clause (b). This distinction has now been taken away by the Amendment Act. Previously, the line of distinction was a limitation period of four years and the limitation period exceeding four years. The Assessing Officer would reopen a back assessment within a period of four years as long as he had reason to believe in consequence of any information, that income has been under-assessed or income has escaped assessment. In the case of limitation, providing for a period exceeding four years, there should have been a failure on the part of the assessee to disclose fully and truly all material facts leading to the escapement of income. But as a result of the amendment brought with effect from April 1, 1989, the above distinction had been obliterated and the Assessing Officer could reassess the income as long as he had reason to believe that income chargeable had escaped assessment. The new law has inserted a proviso to section 147 in the following words:
>
> > "Provided that where an assessment under sub-section(3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year."
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> In addition to the time-limits provided for under section 149, the law has provided another limitation of

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four years under the proviso to section 147. As far as the above proviso to section 147 is concerned, the law prescribes a period of four years to initiate reassessment proceedings, unless the income alleged to have escaped assessment was made out as a result of failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment."

5. The Tribunal has applied the correct principle of law and held as follows:-

"But whether recourse to section 147 could be made beyond four years is the real question in the present appeal. Circumstances for extending limitation beyond four years do not exist in the facts of the present case. As such on the ground of limitation assumption of jurisdiction under section 147 is bad. In the case of CIT Vs. Foramer France 264 ITR 566 (S.C.), it was held that if there is no failure to file return or to disclose fully and truly all material facts, issuance of notice beyond the period of four years is barred by limitation. In the case of CIT Vs. Annamalai Finance Ltd., 273 ITR 451 (Mad) it was held that section 147 of the Act does not postulate conferment of power upon the Assessing Officer to initiate reassessment proceedings upon a mere change of opinion. It is incumbent on the Assessing Officer to prove that there was a failure to disclose material facts necessary for the assessment for the issuance of notice beyond the period of four years.

11. It is true that the Apex Court does not make the law from the date it is pronounced but from ab initio. This theory is based on the principle of ACTUS CURIE NEMINEM GRAVIBIT (An act of the court shall prejudice no man). The party ought not to be prejudiced by the delay, but should be allowed to enter up his judgment retrospectively to meet the ends of justice. When highest court of the land declares a principle of law, it should be assumed as if this was the law for all time. But law is not an antique to be abroad, dusted and put back on the shelf. It is dynamic in nature. It is often difficult to describe with exactitude the correct position of law at a given point of time. Till the time apex body determines the correct position things go as per the interpretation of law made by competent courts. At time there may arise cleavage of judicial opinion. But matter gets settled when Supreme Court adjudicates it. Inability to anticipate the view to be taken by the apex court cannot be termed as failure on the part of the assessee. Previous knowledge never becomes non existent it goes on developing in the lap of time. Human knowledge is always improving and

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progressing. The world was assumed to be flat until it became known that the would is found. That does not mean that gravitation did not exist before Newton's discovery of the law of gravitation. Human knowledge is never static. Theory of evolution of Darwin does not make the previous knowledge non existent. Human knowledge, as we have mentioned, is always progressing. So relativity was always there but we became aware only after Einstein. This is the basic difference between discovery and invention. The information about the law on the basis of which 147 proceedings were initiated, was not there until the Supreme Court says it to be so. Therefore, what the Orissa High Court has held at that time was a relevant judicial interpretation as to the law. In the circumstances it cannot be said that income escaped assessment by reason of failure on the part of the assessee."

From a reading of the above, it is clear that the Tribunal had given a categorical finding by applying the law enunciated by the Supreme Court judgment in the case of Commissioner of Income-tax Vs. Foramer France, reported in 264 ITR 566, as well as this Court judgment cited supra and come to the correct conclusion. Hence we do not find any error or legal infirmity in the order of the Tribunal so as to warrant interference. Under these circumstances, no substantial question of law arises for consideration of this Court and accordingly the tax case is dismissed. No costs.

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Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1. The Assistant Registrar,
   Income-tax Appellate Tribunal,
   Chennai Bench "A", Chennai.

2. The Asst Registrar,
   Income Tax Appellate Tribunal,
   Rajaji Bhavan, Bensand Nagar, Chennai(5 Copies)

3. The Secretary,
   Central Board of Direct Taxes,
   New Delhi.

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4. The Commissioner of Income-tax (Appeals)III,
   Chennai-600 034.

5. The Deputy Commissioner of Income-tax,
   Company Circle-IV(1), Chennai-600 006.

+ 1 cc to Mrs. Pushyasitaraman, Sr Standing Counsel for Income Tax (33544)

PPV(CO)
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